

D.C. Circuit Vacates Clean Air Interstate Rule, Creating Uncertainty for Air Regulatory Programs

On July 11, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or the Court) vacated the entire Clean Air Interstate Rule (CAIR), holding that the CAIR has “more than several fatal flaws.” *North Carolina v. EPA*, No. 05-1244, Slip Op. (D.C. Cir., July 11, 2008).

BACKGROUND

The Environmental Protection Agency (EPA) promulgated the CAIR in 2005 to address the interstate transport of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) emissions, and the impact of such transport on the ability of “downwind” states to attain ambient air quality standards for ozone and fine particulate matter. SO₂ and NO_x emissions are “precursors” of ozone and fine particulate matter pollution.

The Clean Air Act imposes a duty on each upwind state to adopt emissions control measures that address interstate transport of emissions. Specifically, Title I of the Act requires each state to develop control measures for emissions activities within the state that are “contributing significantly to” nonattainment of air quality standards in another state, or “interfere[ing] with the maintenance” of such standards. Each state must incorporate these interstate control measures into its federally enforceable State Implementation Plan (SIP). Invoking its Title I authority, EPA used the CAIR to establish SO₂ and NO_x emission “budgets” for 28 states (and the District of Columbia) in the Eastern half of the United States. The CAIR would have required the states to meet their budgets over two phases with compliance deadlines of 2010 and 2015 for SO₂, and 2009 and 2015 for NO_x.

The CAIR also would have given covered states the option of participating in interstate “cap-and-trade” programs. The CAIR NO_x cap-and-trade program would have supplanted the now-existing “NO_x SIP Call” cap-and-trade program. The CAIR SO₂ cap-and-trade program would have required submission of allowances from the nationwide SO₂ cap-and-trade established under Title IV of the Act, which Congress created to address acid rain. To achieve the additional CAIR SO₂ reductions, EPA imposed SIP requirements for retiring acid rain allowances for CAIR compliance, that were more stringent than the statutory acid rain requirements.

FLAWS FOUND IN THE CAIR

The D.C. Circuit found a number of flaws with the CAIR, including the following:

- EPA failed to explain how an interstate trading program – in which sources in covered states could buy and sell rights to emit – would ensure that the emissions from each covered state remain below a specific level that avoids “significant contribution” to nonattainment in downwind states.

- EPA failed to give independent effect to the requirement that states avoid “interfering with the maintenance” of air quality standards in other states. As a result, the CAIR may have omitted states that should have been subject to regulation.
- EPA’s establishment of state SO₂ and NO_x budgets was arbitrary and capricious because the budgets were based on factors other than each state’s “significant contribution.”
- The CAIR’s 2015 compliance deadline failed to ensure that covered states would reduce their emissions in sufficient time to allow the downwind states to attain the relevant air quality standards.
- Nothing in the statute conferred on EPA the authority to terminate Title IV allowances by forcing submission of such allowances under the CAIR.

THE CAIR IS VACATED IN ITS ENTIRETY

The Court considered whether it would be feasible to remand only certain parts of the CAIR to EPA, but leave the rule otherwise in effect. However, the Court reasoned that the CAIR was “one, integral action,” and concluded that legal flaws in the rule were of such a magnitude that “very little [would] survive a remand in anything approaching recognizable form.” As a result, the Court vacated the rule in its entirety.

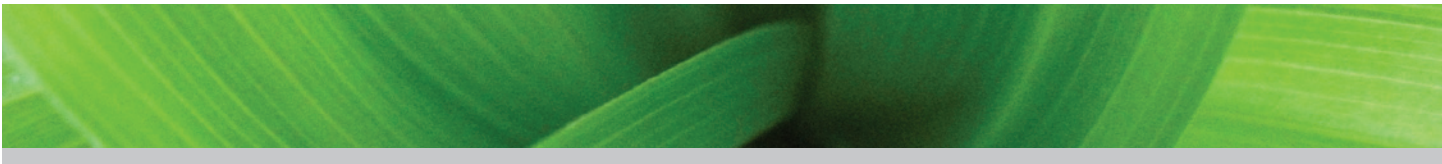
NEXT STEPS AND IMPLICATIONS

With the CAIR vacated, EPA likely will have to promulgate a new rule to address regional transport of emissions. It may also have to address state “section 126 petitions” seeking relief from such transport. A petition from North Carolina is currently pending.

As a result of the D.C. Circuit decision, a new EPA rule might be substantially different from the CAIR; the *North Carolina* Court observed that: “No amount of tinkering with the rule or revising the explanations will transform the CAIR, as written, into an acceptable rule.” In particular, the decision calls into question whether and how EPA can use its Title I authority to establish a regional cap-and-trade program.

In addition, a future transport rule might cover more states because of the independent requirement that states not “interfer[e] with the maintenance” of air quality standards.

The *North Carolina* decision also creates uncertainty across *other* air regulatory programs and related allowance markets. For example, EPA’s approach to addressing SO₂ budgets under the CAIR was aimed at preserving the value of allowances in the Title IV program by taking some portion of those allowances out of circulation. Now, however, it is unclear whether, on remand, EPA will be able to develop new SO₂ emission limits in a way that avoids collateral impacts on the Title IV allowance market.



In addition, EPA has designed a number of other air quality programs so that compliance with the CAIR constitutes compliance with the requirements of the other program. For example, EPA's implementation rules for the fine particulate matter and ozone air quality standards currently allow states to use the CAIR to meet the "Reasonable Available Control Technology" requirements. In addition, EPA's Regional Haze rule authorizes the use of CAIR as "Best Available Retrofit Technology." Vacatur of the CAIR raises question marks for complying with these other program requirements.

Finally, the Court's decision has immediate impacts on states and power companies. Many states were counting on substantial emission reductions from the CAIR to attain the ozone and fine particulate matter standards by 2010. And many power companies have made substantial investments in technologies and emission allowances in order to position themselves for compliance starting in 2009.

FOR ADDITIONAL INFORMATION

For more information on the CAIR decision, and how it might affect your company, please contact Kyle Danish, Stephen Fotis, or any member of the Van Ness Feldman Air Regulation Practice, at (202) 298-1800.

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